

#20400, 1-17-67
#20023, 2-11-66

18 AUG 1980

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CC-28,778 RMT

MEMORANDUM TO: Director
FROM: Chief Counsel
SUBJECT: Freedom of Information Act Appeal
of

This is in further reference to the above-noted Freedom of Information Act request and administrative appeal. The requestor was advised by letter, dated July 28, 1980, that a final determination would be made within 20 business days of that letter, that is August 22, or be advised of the reasons for the delay.

By way of background, we note that (the records which are the subject of this request involve the sale and transfer of National Firearms Act weapons manufactured and transferred by) As part of his request, applicant seeks "[all] documents of transfer

to any person beginning in the year 1934 and ending December 31, 1945." The requestor also sought "[all] documents showing the transfer of each firearm in the possession of in 1934 including the model and serial number of each firearm transferred and the name and address of each transferee from Since the records concern tax returns and return information subject to the nondisclosure rules of 26 U.S.C. § 6103(a), enclosed a waiver signed by the President and secretary of the corporate successor to

By letter dated May 10, 1979, you advised that certain records within the scope of his request were found during the administrative appeal. These records included firearms inventory lists of prepared by serial number, and a list of industrial concerns possessing NFA firearms prepared in 1937 for a congressional committee. It was also determined that a

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card file in the NFA Branch indexing registered weapons by serial number contained transfer records within the scope of request. The letter, dated May 10, 1979, advised of your determination on the disclosure of the records involved, except for the records in the card file. However, [redacted] was also advised that the records would be withheld pending verification of the tax waiver submitted by [redacted] as the successor to [redacted].

Regarding the card transfer records, [redacted] was advised that a search for the weapons covered by the inventory lists would result in an expensive search fee and, further, that the cards once retrieved would be subject to deletions under the FOIA exemptions.

By letter dated December 3, 1979, the law firm acting as general counsel to [redacted] forwarded appropriate verification showing the changes in the corporation's identity. By letter, dated February 20, 1980, the retrieved records were released, in whole or in part, to [redacted]. The letter also requested an advance deposit for conducting the search of the transfer card file indexed by serial number. The letter once again advised that such records, once retrieved, were subject to deletions based on the FOIA. [redacted] for- warded a deposit and the transfer cards were retrieved and copied under the supervision of the disclosure Office. These records are the subject of this memorandum.

Initially, a description of the National Firearms Registration and Transfer Record (NFRTR) is useful. The NFRTR may be entered through two separate filing systems. First, each registered possessor of a firearm has a separate individual file folder within which is a copy of the original registration for each and every firearm in his or her possession. These folders are filed alphabetically by the name of the registered possessor. Thus, when a firearm is transferred, the transfer form registering the weapon to the transferee is filed under the transferee's, not the transferor's name. Second, an index card file is maintained indexing each weapon by serial number (except for those weapons which are registered without serial numbers, which are indexed alphabetically, by the name of the registered owner, in the index card file).

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Since the transfer forms are filed under the name of the transferee, request for all transfer applications by as transferor during the years in question did not describe documents that could be retrieved as described. However, since the Bureau was releasing serial number inventory lists prepared by during the years in question, those lists provided descriptions of records that were retrievable in the index card file. After advising of those cards, he expressed his intent that the cards were records he sought (see letter, dated January 30, 1980, from requestor), and made an advance deposit to cover the search.

In our memorandum to you, dated May 8, 1979, we stated that the identity of the initial transferee was tax return information to . That statement was made with respect to a list of businesses possessing NFA firearms prepared in 1937 for a Senate subcommittee. However, a review of that compilation, along with the other records mailed in the first release to the requestor, indicates that no transferees (as that term is used in the NFA) were disclosed as such, since the vast majority of the information disclosed involved sales by prior to the enactment of the 1934 National Firearms Act. Further, in your appeal determination letter, as well as the letter accompanying the first release and seeking a deposit prior to conducting the search for the transfer cards, was never advised that the initial transferee would be disclosed. Instead, was told that, once retrieved, the transfer cards would have to be reviewed for disclosure and that it was possible that only limited information could be disclosed after incurring a considerable search and copying fee. However, it must be noted that was never expressly advised that the initial transferee would not be released and since this is the information he chiefly desires, it is questionable whether he would have authorized the search had he been so advised.

The Transfer Card Records

The transfer cards, or in some cases captioned "Registration Card," contain a description of the firearm by serial number, model, caliber and kind.

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The front of the card names the initial registrant and the Internal Revenue District where the firearm was registered. While on some cards the first transfer by is written on the front of the card, for most of the cards the initial and all subsequent transfers are recorded on the reverse side. For a number of cards, no subsequent transfers are listed.

The general format of the transfer record contained on these cards states the type of return form(s) submitted to make the transfer and states the name of the transferor and transferee. Six different return forms appear on the various cards. It should be noted that the following description of the forms are for the returns used during the years 1934-1945 since the records retrieved concern that period.

Form 1 - Registration of Firearms.

Form 2 - Return of Firearms Manufactured, Imported, or Received by Manufacturer, Importer, Dealer (Other than Pawnbroker), and Pawnbroker Under the National Firearms Act (Aug. 1934). This return was submitted upon the receipt of NFA firearms by a person licensed under the National Firearms Act.

Form 3 - Return of Firearms Transferred or Otherwise Disposed of By Manufacturer, Importer, Dealer (Other than Pawnbroker), and Pawnbroker Under Chapter 25, Subchapter B, Internal Revenue Code (Aug. 1940). This return was filed by the transferor who was an NFA licensed person upon the disposition of any NFA firearm.

Form 4 - Order Form for Transfer of Firearm. This form was first submitted by the applicant-transferee to the transferor who, in turn, filled in additional information about the weapon involved. The transferor then forwarded the form to the Commissioner of Internal Revenue (CIR) for approval. The CIR approved form was returned to the transferor who gave it to the transferee along with the delivery of the firearm.

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Form 5 - Application for Exemption From Payment of Transfer Tax on Firearms Under the National Firearms Act (Nov. 1935). This form was submitted by the transferor to justify a tax-free transfer of the firearm to one of the tax-exempt categories of recipients under the NFA, such as the Federal Government or a State or local government.

Form 6 - Application for Importation of Firearms. The form was submitted by the importer. This form was also used to permit "war trophy" firearms to be brought into the United States.

In a typical first transfer, more than one form was submitted. For example, [redacted] would submit both a form 3 and form 5 to effect a tax-exempt transfer either to the United States or to a police department; or, when [redacted] would sell a firearm to another NFA licensed person, [redacted] would submit a form 3 recording the disposition and the recipient would file a form 2 showing the receipt of the firearm. Regarding tax-exempt transfers, it is not uncommon that the recipient, such as a police department, subsequently filed a form 1 registering the firearm to the entity.

Law

The Freedom of Information Act exempts from disclosure material which is "specifically exempted from disclosure by statute" provided that such statute meet enumerated criteria. 5 U.S.C. § 552(b)(3). Title 26, U.S.C., § 6103, entitled "Confidentiality and disclosure of returns and return information," has been held to be such a statute by the Federal court in the jurisdiction where the requestor resides. *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir. 1979). Section 6103(a) prohibits disclosure of returns or return information except as provided by Title 26, U.S.C.

The Internal Revenue Code provisions relevant to whether information contained on the transfer cards may be disclosed to Mr. Smith, as a designee of the taxpayer, Auto Ordnance, are as follows:

26 U.S.C. § 6103(b). Definitions. For purposes of this section--

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(1) Return.--The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) Return information.--The term "return information" means--

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

* * * * *

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. (Emphasis added.)

(3) Taxpayer return information.--The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

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(6) Taxpayer identity.--The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

* * * * *

(c) Disclosure of returns and return information to designee of taxpayer.--The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration. (Emphasis added.)

26 U.S.C. § 7701. Definitions.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof--

(1) Person. The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

* * * * *

(14) Taxpayer. The term "taxpayer" means any person subject to any internal revenue tax.

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In the present administrative appeal, since the requestor has submitted a waiver from [redacted] authorizing him under section 6103(c) to receive their returns and return information, it must be determined what information contained on the cards is not tax return information covered by the waiver.

As noted above, the forms 3 and 5 were submitted by the transferor and the form 4 was jointly submitted by both the applicant-transferee and the transferor. For the initial transfer from [redacted] (as well as any subsequent transfers back and forth to [redacted] for firearm repairs), the information on the transfer cards identifying both the transferor and transferee would have been obtained from returns filed, in whole or part, by [redacted]. The principal question is whether the identity of the initial transferee is return information to both the transferor and transferee. If such data is return information to the transferee, then arguably the waiver under section 6103(c) does not permit the disclosure of the transferee's identity since it authorizes a taxpayer to waive the confidentiality provisions of section 6103 only for "the return of any taxpayer, return information with respect to such taxpayer." In other words, ATF could only disclose the fact that [redacted] registered the firearm and transferred it, but could not disclose the identity of the transferee without the latter's waiver. For the reasons stated below, we believe that the fact of registration may be considered tax return information to certain transferees. However, where the tax return naming the transferee was filed solely by [redacted] then we recommend release of the transferee's identity thereon listed since the courts have held that the Secretary has no discretion under section 6103(c) to withhold a return from the taxpayer's designee. Since the transfer cards merely record the receipt of the tax return from [redacted] and list four items of data listed on the return, it does not seem legally defensible to classify the cards as return information of both the transferor and transferee where the return itself containing the same four items would have to be disclosed. We note here that all transfers made subsequent to the [redacted] transactions are clearly outside the scope of the waiver since those transactions are tax return information to other taxpayers. This material includes any subsequent Form 1, Registration of Firearms, made by the transferee.

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The status of the transferee under 26 U.S.C. Chapter 53, is different from the treatment accorded persons who are "taxpayer(s)" under the other provisions of the Internal Revenue Code (IRC). Under present law, the transferee is never liable for the payment of the transfer tax, 26 U.S.C. § 5811(b), nor was the transferee liable for the tax under the law in force at the time the records involved were created. Section 3(a) of the National Firearms Act, 48 Stat. 1237 (hereinafter referred to as the 1934 Act). The legal obligation to register the firearm being transferred is also placed on the transferor by 26 U.S.C. § 5841(b), which states, in part: "Each firearm transferred shall be registered to the transferee by the transferor." Adherence to the transfer requirements would also have registered a gun to the transferee under section 3(a) of the 1934 Act.

While the IRC does not require payment of the tax or places the duty to register on the transferee, the IRC does place certain responsibilities and legal sanctions on the transferee as a requisite to the lawful possession of the firearm. First, no transfer may be made unless pursuant to an application, 26 U.S.C. § 5812(a). The general application, form 4, requires the transferee to provide certain information and sign the form. 27 C.F.R. §§ 179.84 and 179.85. If the transfer is between special (occupational) taxpayers, or to the United States, or to any State, political subdivision or official police organization of such government entity engaged in criminal investigations, then the transferor submits a form 3 or form 5 establishing the tax-exempt status of the transfer transaction, instead of the form 4. 27 C.F.R. §§ 179.88, 179.89, and 179.90, respectively.

Second, once the firearm is registered to the transferee, the IRC requires the person possessing the firearm to "retain proof of registration which shall be made available upon request." 26 U.S.C. § 5841(e). The regulations enable the possessor to comply with this duty since the regulations require the transferor to deliver a copy of the approved transfer form along with the firearm to the transferee.

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Third, subchapter C of 26 U.S.C. Chapter 53, enumerates the prohibited acts under the NFA, and many of the prohibited acts are directed to the conduct of the transferee. Section 5861 provides, in part:

It shall be unlawful for any person--

(b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or

(c) to receive or possess a firearm made in violation of the provisions of this chapter; or

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter; or

(g) to obliterate, remove, change, or alter the serial number or other identification of a firearm required by this chapter; or

(h) to receive or possess a firearm which is not identified by a serial number or other identification required by this chapter obliterated, removed, changed, or altered; or

(i) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or

(j) to transport, deliver, or receive any firearm in interstate commerce which has not been registered as required by this chapter; or

(k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or

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(1) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false. (Emphasis added.)

Any person who violates or fails to comply with any provision of 26 U.S.C. Chapter 53 may be fined not more than \$10,000, or be imprisoned not more than ten years, or both. 26 U.S.C. § 5871. Further, any firearm involved in any violation of 26 U.S.C. Chapter 53 is subject to seizure and forfeiture. 26 U.S.C. § 5872(a).

Based on the above, it is apparent that since the transferee is not liable for the transfer tax, nor responsible for submitting the transfer return (except for a portion of the form 4), such transferee does not fall within the general definition in section 7701 of "taxpayer" as "any person subject to any internal revenue tax." Nevertheless, it is also apparent that the transferee, as such, has a status under Chapter 53 of the IRC which imposes criminal penalties on the transferee and provides for the civil forfeiture of the transferee's firearm. Noteworthy is the qualification contained in section 7701(a) on the application of the general definitions stating that the several definitions apply only "where not otherwise distinctly expressed or manifestly incompatible with the intent thereof." Therefore, for purposes of determining the application of the disclosure provisions of section 6103 on the release of information collected by the Secretary under Chapter 53 the fact that the transferee is not liable for the tax does not necessarily mean that the transferee is not a "taxpayer" with respect to "return information" subject to section 6103.

Section 6103(a) establishes the general rule that returns and return information are to be confidential, and disclosed only in statutory enumerated situations. As noted earlier, "return information" is broadly defined to cover not only the taxpayer's identity and information regarding items of income and the like, or the fact of a tax return investigation, but also includes:

"any other data, received by, recorded by, prepared by, furnished to, or collected by the

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Secretary with respect to the determination of the existence or possible existence of liability . . . of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,
(Emphasis added.)

By referring to "any person," rather than any taxpayer, the statutory definition recognizes that information submitted to the Secretary by one person can be return information to another person.

The legislative history of section 6103 merely reiterates the breadth of "return information," without providing any further elaboration on the Congress' intent. The Senate Report, in which section 6103 was first introduced in the Tax Reform Act of 1976, states, in part:

It also includes any particular of any data, received by, recorded by, prepared by, furnished to, or collected by IRS with respect to a return filed by the taxpayer, or with respect to the determination of the existence, or possible existence of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense provided for under the code. S. Rep. No. 94-938, Part I, 94th Cong., 2d Sess. 318 (1976).

The Conference Committee summarized this part of the Senate amendment by stating:

"Return information" is defined as any data received by or prepared by the Secretary with respect to a return or with respect to the determination of the liability of any person for any tax, penalty, interest, fine, forfeiture, or other imposition. H.R. Conf. Rep. No. 94-1515, 94th Cong., 2d Sess. 476 (1976).

In Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir. 1979), the court was more specific than the above-quoted legislative history in stating what constitutes "return information" under the portion of the definition quoted above. The court recognized case reports, witness statements and grand jury testimony, memorandum of conferences,

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and IRS in-house letters constituted "return information" because the documents were collected or prepared by the Secretary and related to either the tax liability of third party taxpayers or to the potential liability of the requestor-taxpayer for deficiencies or penalties. 589 F.2d at 840-41. However, the court's description of the documents do not indicate whether any of the documents were prepared by the plaintiff-requestor as a taxpayer, but were withheld on the grounds that they also constituted "return information" to a third person. Thus, with respect to "return information," Chamberlain, supra, does not directly address the issue involved in the present request.

Due to the uniqueness of the taxing scheme established under 26 U.S.C. Chapter 53, the disclosure cases relating to other IRC provisions do not resolve the question of whether the transferee is a "taxpayer" or is a person entitled to the "return information" protection of section 6103(a). Rather, a general analysis of purpose and structure of section 6103 provides the only guidance.

Recent court decisions have recognized that section 6103 is the sole criteria for determining the disclosure of tax returns and return information, and one court has held that, even in a FOIA suit, the applicable standard of review is under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. Zale Corporation v. IRS, 481 F. Supp. 486, 490 (D.D.C. 1979). Since section 6103 is a statute independent of the FOIA, it "is not subject to the requirement that FOIA exemptions be construed narrowly," even though the agency may still rely on FOIA exemptions to withhold information otherwise disclosable under section 6103. Moody v. IRS, Civ. Action No. 77-1825, D.D.C., February 28, 1980 (Prentice-Hall, Government Disclosure, ¶ 80,033). Section 6103 is a "legislative proclamation of a rule of confidentiality with limited statutory exceptions," Zale Corporation, supra, at 489, and the Third Circuit has observed in regards to the disclosure authorization under section 6103(h)(3)(A) that:

"We must be ever mindful that when Congress enacts a statute designed to limit the government intrusion in the private affairs of its citizens, the statutory provisions must be

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followed scrupulously." United States v. Bacher, 611 F.2d 443, 447 (3d Cir. 1979).

In section 6103(a), Congress expressly provided for the disclosure of special types of returns and return information, such as joint individual returns, partnership returns, corporation returns, estate returns and trust returns. None of these sections are applicable to whether the NFA transferee has a material interest in the return submitted by the transferor. Except for section 6103(o)(1) which authorizes the disclosure of subtitle E (i.e., Chapters 51-53) tax information to Federal employees whose official duties require such information, the only disclosure subsection regarding Chapter 53 returns and return information is section 6103(d) governing disclosure to State tax officials. That section does not include Chapter 53 tax information in the thirteen enumerated IRC chapters of tax information that shall be disclosed. Finally, it should be noted that apart from the section 6103 nondisclosure rule, section 5848 restricts the evidentiary use of information obtained from a natural person as part of the registration procedure in any criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, except for furnishing false information. Based upon this section and the Solicitor General's assurances that "no information filed is as a matter of practice disclosed to any law enforcement authority," except the fact of registration as may be necessary to an investigation or prosecution under the NFA, the United States Supreme Court held that the present NFA did not violate the Self-incrimination Clause of the Fifth Amendment. United States v. Freed, 401 U.S. 601, 604-05 (1971).

Based on the above, we believe that a reasoned argument supports the conclusion that the fact of registration of an NFA firearm is "return information" to the transferee since that fact is collected by the Secretary to determine whether a fine, penalty, or forfeiture is applicable to the transferee. Even though the transferee does not fall within the general definition of "taxpayer" in section 7701(a)(14), the transferee's identity should be accorded the protected status under section 6103 in light

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of the responsibilities and sanctions placed on the transferee as a possessor under the 26 U.S.C, Chapter 53.

The remaining question involves determining the scope of the information on the transfer cards that may be disclosed to

The requestor submitted a waiver by Under section 6103(c), the secretary may disclose to the designee of a taxpayer the "return of any taxpayer, or return information with respect to such taxpayer." In *Chamberlain v. Kurtz*, supra, the Fifth Circuit interpreted this section (and section 6103(e)(6)) to mean:

They give the taxpayer unrestricted access to his own return, but as to other information or materials collected by the IRS in determining tax liability, availability is conditioned on the Secretary's determination that such access would not impair tax administration. 589 F.2d at 837. (Emphasis added.)

In *Moody v. IRS*, supra, the District Court for the District of Columbia held that the Secretary had broad discretion under section 6103(c) and could apply other FOIA exemptions to withhold return information instead of merely the impairment of the tax administration standard recognized in *Chamberlain*, supra. However, the court's remarks on the Secretary's discretion was in reference to "return information" and not to "returns."

By recognizing the absolute right of the taxpayer to have the latter's return given to a designee, it appears incongruous to conclude that the initial transferee information on the transfer card is return information with respect to that the Secretary has discretion to withhold where is the taxpayer who filed the return. The transfer card contains four items of information taken directly from the return. Those items are the type of return form used, the date of the return, the name of the transferor and the name of the transferee. Only in the case of the form 4 would the transferee's identity have been written on a portion of the form completed only by the applicant-transferee. In the present case, only two out of the approximately 1,500 transfer cards involved are form 4 transfers to individuals. With the exception of a few

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transfers to special (occupational) taxpayers, all of the other cards are forms 3 and 5 transfers from to either the Federal Government or to state and local law enforcement agencies.

In other words, assuming the forms 3 and 5 filed by were available, ATF would be obligated to release the returns even though the same four items of information are on those forms. As noted in the earlier description of the National Firearms and Registration Transfer Record, the transfer forms are filed under the name of the transferee as the registered possessor of the firearm. Initial request sought all "documents of transfer applications" filed with the Federal Government by between 1934 and 1945. As worded, this request did not identify records that could be retrieved under name. To the extent that the transfer forms have not been destroyed, the transfer cards make these transfer applications identifiable records since the forms should be in a folder under the transferee's name. (It is our understanding that all of the forms transferring firearms to the United States during the time involved have been destroyed.) Should a search be conducted and these forms retrieved, they would have to be disclosed in full. Since the transfer cards act as an index of the transfer forms filed, it is difficult to justify deleting the transferee's name on the card on the basis that it is "return information" to the transferee, while using the same card to locate a transfer form for release that discloses the transferee's name.

Other legal considerations mitigate the conclusion that all transferees' identities constitute "return information" to each transferee. A large number of the cards involve transfers to the Federal Government. It is difficult to argue that the fact of these transfers is "return information" to the Federal Government. First, the Federal Government is not a "person," and, therefore, not a "taxpayer" under the general definitions in section 7701. Second, the present NFA excludes NFA firearms in the possession of the United States from registration in the NFRTR. Finally, ATF has previously recognized that a transfer from the United States to a person or entity is not a taxable transaction within the

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purview of the NFA. Chief Counsel Opinion No. 20400, dated February 17, 1967, held that a transfer by a Federal Reserve Bank was not a taxable event since such Government entities were immunized by statute from Federal tax. However, the opinion also advised that a Federal agency in possession of an unneeded NFA firearm should abandon it to GSA rather than sell it to a dealer or private individual. Therefore, we do not believe that the rationale for determining that the fact of registration is "return information" to the transferee applies to firearms transferred to the United States. Such information is return information solely to the transferor who files the return to justify his exemption from the transfer tax.

On the remaining transfer cards the vast majority of the initial transferees are State and local law enforcement agencies. Some of the considerations for determining the transferee status is not tax return information to the entities of the United States, also apply to State and local entities. These entities are not "persons" under section 7701. Regarding the application of the transfer tax under Chapter 53, to the States, the Bureau has taken the position that a State entity may transfer a NFA weapon free of the transfer tax. Since the NFA does not provide for such an exemption, the basis of the position is founded on the implied immunity under the United States Constitution of the transferring agency from Federal taxation as a State instrumentality. Chief Counsel Opinion Nos. 20023, dated February 11, 1966, and 20400, dated February 17, 1967. However, the State entities are subject to the registration requirements and, further, are subject to certain restrictions on the subsequent transfers of form 10 registered firearms.

Based on the above, we recommend that the information recorded on the transfer cards provided solely by tax returns filed by _____ is material that should be released to the requestor as designee of the taxpayer. The form 4 tax return, however, is prepared in part by both the transferor and transferee. We recommend that references to these returns be deleted. (See, pages 189 and 321.) Since they are jointly prepared, it is not clear that one preparer could authorize release of the return. Finally, _____ filed

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forms 2 upon receipt of firearms returned for repairs. We recommend releasing this information under the same rationale discussed above, since these forms 2 were filed only by

Apart from listing the transferor and transferee, the transfer cards contain various other types of information and administrative markings.

Many of the transfer cards concerning the firearms acquisition by State and local law enforcement entities include the name of the sheriff or police chief to whose attention the firearm was shipped. 5 U.S.C. § 552(b)(6) exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In Wine Hobby USA, Inc. v. IRS, 502 F.2d 133 (3d Cir. 1974), the court held that a list of names and addresses on forms submitted by a family member to permit home wine-making fell within the scope of the "files" included in exemption (b)(6). In general, we believe that the NFA material is a "file" within the meaning of this exemption since the fact that one possesses a registered firearm or other regulated weapon is the "personal quality of information" that is the "common denomination" of the type of files enumerated in exemption (b)(6). 502 F.2d at 135. The second question is whether disclosure would result in a clearly unwarranted invasion of personal privacy. The Attorney General has stated that such information must be of a nature that a person "could reasonably assert an option to withhold it from the public at large because of its intimacy or its possible adverse effects upon himself or his family." Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, page 10. In Wine Hobby, supra, the court held that information about one's home and family was protected where the only "public interest" was "private commercial exploitation." 502 F.2d at 137. To the extent that the cards identify private citizens who possess NFA firearms, we believe exemption (b)(6) may be applied to withhold their identities. (See, reverse of page 121.) However, where a person is named simply as a public official who received the firearm on behalf of the law enforcement entity purchasing the firearm, we do not believe that this is the type of personal information protected by the exemption.

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We, therefore, recommend disclosure of the material where the initial transferee's identity includes the name of a public employee.

Several other items appear on the transfer cards. The recipient of a NFA firearm who was also a NFA licensed person filed a form 2 return for receipt of the firearm. Thus, a NFA licensed person receiving a firearm from [redacted] would file a form 2 for the same transaction that [redacted] filed a form 3. We recommend deleting any reference to the form 2 filed by these taxpayers since the existence of the form would disclose their status as a person possessing a special (occupational) tax stamp under the NFA. The status is "return information" to these taxpayers.

Several firearms were transferred and registered to sales representatives of [redacted] for demonstration purposes. The transfer cards disclose that these guns were still owned by [redacted] and were subsequently returned to the company. Since these weapons were registered to the sales representatives in an agency capacity with [redacted] we recommend release of this information since the transferees possessed the firearms solely as part of their duties with [redacted].

Also, the instructions on the Form 1, Registration of Firearm states that when an employee has custody of the firearm, it should be registered to the actual owner. Therefore, it is not clear that these firearms should have been registered to the sales representatives. However, the registration information was withheld where the firearm was registered to a person without any agency relationship indicated on the card, even though that person's name had appeared on another transfer card as a sales agent. In these cases, it should be assumed that the firearms registration is tax return information to the person registering the firearm.

The transfer cards recording subsequent transfers contain docket numbers. (See, for example, the reverse of page 22.) These numbers correspond to a docket book maintained by the NFA Branch in which all incoming transfer forms are recorded. This docket book contains the following type of information: type of form

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received, date of form, date of receipt by ATF, names of the transferor and transferee, type of action taken by ATF, and date ATF mailed out notification of its action. Since the number does not identify a particular taxpayer, it falls outside the definition of return information in section 6103(b)(2). See, generally, Long v. IRS, 596 F.2d 362, 368-69 (9th Cir. 1979). Also, the number does not fit within the definition of "taxpayer identity" under section 6103(b)(6). Finally, the NFA Branch could not determine any demonstrable harm in disclosing the number that would justify exercising the internal practices exemption under 5 U.S.C. § 552(b)(2). Therefore, we recommend disclosure of docket numbers.

Several cards refer to an "A.T.U. Report" prepared in 1942. (See the reverse of pages 146, 150, and 154.) The reference is apparently to the Bureau's predecessor Alcohol Tax Unit in IRS. Since the reference does not disclose any particular transfer transaction or the fact of possession by a person, we believe disclosure of the mere reference to the report is not prohibited by section 6103(a).

Finally, as a result of the transfer cards being retrieved by serial number, the NFA Branch personnel photocopied some cards where the initial registration was made by a person other than

We recommend these cards be deleted in full since the information contained thereon is not return information subject to the waiver by

If you are in agreement with the above recommendation, we have prepared a letter so advising the requestor of the decision.

(Signed) Marvin J. Dessler

Marvin J. Dessler

Attachments

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